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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1249

BOARD OF TRANSPORTATION OF NEW CASTLE COUNTY, DELAWARE, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–5a) is reported at 371 F. 2d 733. The orders of the Civil Aeronautics Board (R. 542, 572, 588, 593, 609) are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6a) was entered on November 17, 1966, and its order denying rehearing *en banc* (Pet. App. 6a) was entered on January 9, 1967. The petition for a writ of certiorari was filed on April 10, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board properly applied its "use it or lose it" standard when it eliminated Wilmington, Delaware, from one of the routes served by Allegheny Airlines.

2. Whether, assuming an arguable defect in the form of the Board's ultimate finding of public convenience and necessity, the court of appeals erred in not remanding the case to the Board, when the alleged defect was not called to the Board's attention and was not found by the court to be prejudicial.

3. Whether the Administrative Procedure Act required the court of appeals to discuss every legal contention raised by the petitioner.

STATUTES AND REGULATIONS INVOLVED

Some of the pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*; the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 1001 *et seq.* (prior to recodification by P. L. 89–554, 80 Stat. 378, 5 U.S.C. 551–559, 701–706); and the regulations and policy statements of the Civil Aeronautics Board, 14 C.F.R. Part 399 are set forth in Appendix B to the petition for certiorari. Other pertinent provisions of the foregoing are set forth in Appendix A to this brief (*infra*, pp. 15–19).

STATEMENT

Following a full evidentiary hearing in which petitioner [1] participated, the Civil Aeronautics Board by

[1] References in this brief to "petitioner", and to "Wilmington" as a party litigant, refer to the present petitioner's predecessor

order amended the certificate of public convenience and necessity held by Allegheny Airlines, Inc., a federally subsidized local-service air carrier, so as to delete Wilmington, Delaware, as an intermediate point on segment 3 of Allegheny's route, running from New York to Pittsburgh via Philadelphia, Wilmington and central Pennsylvania points. The effect of this action was to terminate Allegheny's authority to resume its direct service between Wilmington and segment 3 points west of Wilmington, principally Pittsburgh—service which Allegheny discontinued in 1963 after many years of substandard traffic response, and whose resumption petitioner was demanding. The Board's action did not affect Wilmington's service on Allegheny's segment 8 (Boston-Washington via numerous intermediates) or its service on Eastern Air Lines' routes 5 and 6 (Boston-Washington-points west and south).[2]

Section 401(g) of the Federal Aviation Act, 49 U.S.C. 1371(g) (*infra*, p. 16), authorizes the Board, after notice and hearing, to amend the certificate of any air carrier if the public convenience and necessity so require. The Board has adopted a "use it or lose it" policy, 14 C.F.R. 399.11 (*infra*, pp. 17–19), whereby cities which do not make sufficient use of subsidized air service to justify its cost to the carrier and the government are subject to decertification proceedings

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in interest, the New Castle County Airport Commission, which represented the interests of the Wilmington community before the Board and in the court of appeals.

[2] Allegheny also retains authority to render either connecting or single-plane service between Wilmington and Pittsburgh via either Philadelphia or Washington.

under Section 401(g). The standard of use set by the Board is the origination of an average of 5 passengers per day at the city in question over a representative 12-month period on each route segment on which it is certificated; however, the Board's policy statement warns that this is a minimum standard and that a city generating a scant 5 passengers a day "cannot safely assume that continued service is assured" (14 C.F.R. 399.11(b)). In prior "use it or lose it" investigations, the Board has terminated subsidized service to some 67 communities pursuant to this policy.

Finding that at Wilmington in 1962 an average of only 3.1 passengers a day had enplaned on Allegheny's segment 3, the Board initiated an investigation under the "use it or lose it" policy to determine whether the public convenience and necessity required termination of Wilmington's certification on this segment (R. 13–17). Shortly thereafter, Allegheny discontinued its direct Wilmington-Pittsburgh flights and rendered thenceforth only connecting service via Philadelphia or Washington.[3]

At the hearing, the evidence showed that in the last full year of direct Wilmington-Pittsburgh service, only 1.4 passengers a day were enplaning at Wilmington for Pittsburgh and points beyond, and only 0.35 for other segment 3 points not also served on other Alle-

[3] In a separate proceeding the Board held that this form of service was permissible under Allegheny's certificate, but that the public need for resumption of direct service would be one of the matters considered in the "use it or lose it" case (Order E–20483, Feb. 14, 1964). Petitioner did not appeal this order.

gheny route segments (R. 506, 508).* It also showed that the Philadelphia International Airport is only 21 miles and 50–60 minutes driving time from downtown Wilmington; that frequent and inexpensive limousine service is available (R. 504–505); that the air service to Pittsburgh and points west available at Philadelphia is faster, cheaper, and far more frequent than that available at Wilmington's own airport; and that in consequence the bulk of Wilmington-Pittsburgh air travelers have habitually used the Philadelphia airport (R. 544–545).

The Board's hearing examiner found, however, that Wilmington's segment 3 traffic could be increased to the 5-a-day level if Allegheny would double its former Wilmington-Pittsburgh flights and reduce the number of stops made (R. 509–510). He estimated that Allegheny would lose money on these flights and would therefore require increased subsidy (R. 515), but nevertheless recommended against Wilmington's deletion from segment 3 (R. 516).

The Board disagreed with the examiner's application of the "use it or lose it" policy to the circumstances shown of record (R. 542–553). It pointed out that 5 passengers a day is simply a *prima facie* minimum standard of service use under the policy, and that the public convenience and necessity are to be determined by weighing and balancing all relevant factors. Traffic response (historic and potential) is only one such factor. Others relevant here were the ready accessibility of the Philadelphia airport and the su-

*Petitioner disclaimed interest in resumed service to any segment 3 point other than Pittsburgh.

perior services to Pittsburgh available there; the fact that only slight added convenience and minor savings of time and distance to the Wilmington-Pittsburgh traveler resulted from use of Wilmington's own airport; and the disproportionate cost of the direct service to the carrier and to the government in subsidy, which cost the Board found had been seriously underestimated by the examiner. The Board found that an increase in the former number of Wilmington-Pittsburgh flights would increase total patronage, but not as much as the examiner thought, nor enough to justify the greatly increased costs to be incurred.

In a supplemental opinion and order containing further findings on subsidy cost and discussing its past precedents [5] (R. 572–587), the Board denied Wilmington's petition for reconsideration of its decision.[6]

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[5] The statement that "the Board conceded numerous errors" (Pet. 5) is entirely untrue. The Board corrected a single minor misstatement in its earlier opinion concerning traffic statistics for a four-month period in 1961, but held that this correction required no change in its conclusion (R. 582–583).

[6] The facts surrounding the adoption of the June 1 order are set forth in the Board's subsequent order of July 23, 1965 (R. 591–592). Briefly, the Board completed its quasi-judicial action on the former order under its "notation" voting procedure on the morning of June 1, when the fifth and final member of the Board signed the order (three members concurred, two signed as not participating). Shortly after noon on the same day, and before the Board's staff had completed the ministerial function of serving the order on the parties, one of the concurring members left the Board for another government post.

Under the "notation" procedure, an item ready for final Board action is circulated to each member, who indicates in writing his participation and vote and whether or not he wishes the item "calendared" (discussed at a Board meeting). If no member requests calendaring, and a majority of a quorum

Subsequently, the Board in brief orders rejected three further attempts by petitioner, on various grounds, to reopen the case (R. 588, 593, 609).

The court of appeals, in an opinion by Judge Leventhal (Pet. App. 1a–5a), affirmed the Board's orders. It held that the Board had properly assessed the requirements of the public convenience and necessity by weighing and balancing the factors of passenger convenience, volume of traffic affected, and subsidy cost. It found no conflict between this decision and either the Board's prior decisions or its "use it or lose it" policy statement. The court also rejected petitioner's claim to have been surprised by the Board's use of the balancing technique, observing that the petitioner had in fact introduced extensive evidence as to each factor the Board considered. Finally, the court noted that the Board's ultimate public convenience and necessity finding was phrased negatively, rather than positively as it considered the statute to require; but since petitioner had failed to make this objection before the Board, and in view of the clarity of the Board's explanation for its action deleting Wilmington from segment 3, the court did not "think the interest of justice would be served by remand for further proceedings."

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concur, the item is deemed approved as soon as the fifth member indicates his vote, whereupon it is immediately recorded, publicly issued, and in due course served on the parties. It has also been the Board's practice routinely to ratify orders adopted by notation at the next convenient Board meeting (here, the meeting of June 8, 1965).

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ARGUMENT

The decision below is correct, there is no conflict of decisions, the case is of no practical importance, since setting aside the Board's orders would not result in any change in the present pattern of air service at Wilmington, and no substantial question warranting consideration by this Court is presented. Accordingly, there is no occasion for further review.

1. The Board here observed the decisional standards announced in its "use it or lose it" policy statement (14 C.F.R. 399.11, *infra*, pp. 17–19) and in its relevant prior decisions. Petitioner misapprehends the criterion for maintaining subsidized service to a community. The *prima facie* standard for retention of subsidized service—an average of 5 passengers a day—refers to actual use of the service during the relevant test period, not possible use given a hypothetical level of service. The evidence showed that the minimum level of use had not in fact been achieved at Wilmington. The examiner's finding that use might be increased if Allegheny doubled the number of flights is, therefore, irrelevant to the Board's "use it or lose it" standard.[8a] Furthermore, the 5 passengers per day standard has never been the conclusive determinant of the public convenience and necessity for retention or

[8a] In some cases, a showing that the existing pattern of air service was wholly inadequate to meet the travel needs of the community has been a factor (along with isolation, national defense needs, etc.) in leading the Board to find "unusual or compelling circumstances" warranting refusal to apply strictly the "use it or lose it" standard. *Mohawk Intermediate Points Renewal*, 33 C.A.B. 149, 150; *West Coast Air., Intermediate Points Renewal*, 33 C.A.B. 237, 239. However, none of these factors was shown to exist here.

loss of subsidized air service. The Board's policy statement and the cases applying it make this quite clear: "A city generating the bare traffic minimum during the trial period cannot safely assume that continued service is assured; the Board expects most cities to exceed the minimum requirements" (14 C.F.R. 399.11(b)). As the court of appeals pointed out (Pet. App. 4a), petitioner has never been able to to cite any Board pronouncement to the contrary.

Petitioner concedes (Pet. 15–16), as it must in the light of the unanimous authorities,[7] the validity of the weighing-and-balancing technique of assessing the public convenience and necessity. But it contends that the Board mistakenly considered factors applicable only to the "regional airport" policy rather than those applicable to the "use it or lose it" policy. However, the relevant factors do not differ between these two policies. Passenger convenience, volume of traffic affected, and subsidy costs are always considered in "use it or lose it" cases as well as in "regional airport" cases.[8] Petitioner was fully aware of the factors

[7] *Secretary of Agriculture* v. *Central Roig Rfg. Co.*, 338 U.S. 604, 612–614; *City of Pontiac* v. *Civil Aeronautics Board*, 361 F. 2d 810, 814 (C.A. 6); *Outagamie County* v. *Civil Aeronautics Board*, 355 F. 2d 900, 906–907 (C.A. 7); *Airport Commission of Forsyth County* v. *Civil Aeronautics Board*, 300 F. 2d 185, 187 (C.A. 4). *City of Lawrence* v. *Civil Aeronautics Board*, 343 F. 2d 583 (C.A. 1) is not to the contrary, for the court there affirmed the Board's deletion of service at Lawrence, Mass. (in circumstances closely paralleling those of the present case), based on the balancing technique.

[8] Compare *Airport Commission of Forsyth County* v. *Civil Aeronautics Board*, 300 F. 2d 185 (C.A. 4) ("regional airport"), with *City of Pontiac* v. *Civil Aeronautics Board*, 361 F. 2d 810 (C.A. 6) ("use it or lose it").

the Board would consider since, as the court below pointed out (Pet. App. 5a), it introduced extensive testimony and exhibits as to each of the factors which the Board weighed.

2. Petitioner urges this Court to review the form of the Board's ultimate finding of public convenience and necessity in its first order herein (R. 542, 550–551). It argues that the order was phrased negatively ("the public convenience and necessity do not require continuation of Allegheny's authority"); whereas Section 401(g) of the Act (*infra*, p. 16), under which the Board was acting, is phrased positively ("the Board * * * may * * * amend * * * any such certificate * * * if the public convenience and necessity so require"). This contention was never raised before the Board in any of the petitioner's numerous requests for reconsideration and rehearing and is therefore barred by Section 1006(e) of the Federal Aviation Act.[9] See, also, *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Gearhart & Otis, Inc.* v. *Securities and Exchange Commission*, 348 F. 2d 798, 801 (C.A.D.C.). Petitioner's objection, which raises only a matter of form, could readily have been obviated if petitioner had seasonably raised it before the Board.

In any event, the negative form of the ultimate conclusion did not go to the substance of the case or prejudice petitioner. As the court below found (Pet. App. 5a), the Board made all the fact findings

[9] "No objection to an order of the Board * * * shall be considered by the court unless such objection shall have been urged before the Board * * * or, if it was not so urged, unless there were reasonable grounds for failure to do so."

required by the statute and fully explained its reasons. Moreover, the Board had already held in a separate proceeding that direct Wilmington-Pittsburgh flights were not required by Allegheny's then existing certificate, and that the connecting service Allegheny continued to provide satisfied its certificate obligations.[10] That decision was not appealed. Thus, in the instant case, the issue was not whether Allegheny was authorized to discontinue direct flights, but whether the public convenience and necessity required that it should be directed to resume such flights. After weighing all the relevant factors, the Board found that such resumption was not required. Having found no public need for such resumption, the Board eliminated Allegheny's authority for this service from its certificate, thus conforming the certificate to Allegheny's actual post-1963 flight pattern. Even if a further affirmative finding should have been made in the language of Section 401(g), failure to make it here was not prejudicial error within the meaning of the Administrative Procedure Act (5 U.S.C. 1009(e)). Cf. *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 141–142.

Moreover, setting aside the Board's order on this ground would have no practical result. Allegheny's obligation to serve Wilmington would simply revert to what it had been immediately prior to the Board's order. Allegheny would thus hold authority for direct flights from Wilmington but would only be required to provide connecting service.

3. Petitioner also urges that the court below erred in failing to rule expressly on every issue raised by it.

[10] See n. 3, *supra*, p. 4.

There is no merit whatever in this contention. The court of appeals carefully considered all of the issues raised by appellant and expressly discussed those which it deemed to require discussion.[11]

(a) Petitioner complains that the court of appeals did not pass upon the validity of the Board's "notation" voting procedure, by which the Board's supplemental opinion and order (R. 572–587) was adopted.[12] Petitioner, however, failed timely to raise any issue concerning this procedure before the Board and therefore, under Section 1006(e) of the Act (n. 9, *supra*, p. 10), could not properly do so before the court below. In *Braniff Airways, Inc.* v. *Civil Aeronautics Board* (C.A.D.C., No. 20,160, decided April 12, 1967), a case concerning an order adopted simultaneously with the order here under attack, the same court

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[11] On April 25, 1967, the court of appeals amended Rule 24 of its General Rules as follows:

"(c) *Order Form of Decision.* In accordance with recommendations for improvement of judicial administration, this court may, while according full consideration of the issues, dispense with opinions where the issues occasion no need therefor, and confine its action to such abbreviated disposition as it may deem appropriate, *e.g.*, affirmance by order of a decision or judgment of a court or administrative agency; a judgment, of affirmance or reversal, containing a notation of precedents, or accompanied by a brief memorandum."

See, Report of the President's Commission on Crime in the District of Columbia (1966) p. 308; and see Canon 19, American Bar Association Canons of Judicial Ethics.

[12] Petitioner's description of this procedure (Pet. 5, 17) is entirely inaccurate; see n. 6, *supra*, pp. 6–7. In particular, notation voting is final, not preliminary; while ratification has been customary, under neither the Board's rules nor the relevant statutes is it essential to the validity of an order adopted by notation; and in any case ratification was accomplished here in strict accordance with the Board's customary procedure.

(again per Judge Leventhal), in upholding the notation procedure, explained that it had not passed on the issue in the present case because "it was not properly before us."[13]

(b) Next, petitioner says the court should have held that the Board acted arbitrarily, following its denial of the first petition for reconsideration, in denying rehearing on grounds of changed Board membership. However, the grant of rehearing is strictly discretionary with the agency, *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535, and the validity of the Board's policy of not granting rehearing of finally decided cases whenever its membership changes is obvious.[14]

(c) Finally, petitioner argues that the Board's findings were insufficient because the Board in its opinion failed to recite certain language of Section 102 of the Act (49 U.S.C. 1302), which sets broad standards for the guidance of the Board's action under the overall standard of public convenience and necessity. Nothing in the Act or in prior decisions requires the Board to recite the provisions of Section 102 in every opinion it writes; petitioner's objection is answered in substance by the court's holding that the Board

[13] For the court's convenience, the material portions of the *Braniff* decision, which is not yet reported, are reprinted as Appendix B hereto (*infra*, pp. 20–27). The language quoted in the text is from footnote 2 to that decision (*infra*, p. 22).

[14] The two contemporaneous cases petitioner cites (Pet. 18) are not in point, for in both instances the Board had not yet completed its decisional process when the departure of one member created an impasse, whereas here that process was complete with the adoption of the Board's June 1, 1965 order.

fully explained its action and applied the proper decisional standards.

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted.

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MAY 1967.

APPENDIX A

The relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are:

TITLE IV—AIR CARRIER ECONOMIC REGULATION

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

CERTIFICATE REQUIRED

SEC. 401 [72 Stat. 754, as amended, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

* * * * * *

TERMS AND CONDITIONS OF CERTIFICATE

(e)(1) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require.

* * * * * *

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(g) The Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of the certificate.

* * * * *

TITLE X—PROCEDURE

* * * * *

JUDICIAL REVIEW OF ORDERS

ORDERS OF BOARD AND ADMINISTRATOR SUBJECT TO REVIEW

SEC. 1006. [72 Stat. 795, as amended, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days

after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

FINDINGS OF FACT CONCLUSIVE

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

The relevant provisions of the regulations of the Civil Aeronautics Board, "Statements of General Policy," 14 C.F.R. Part 399, are:

399.11 *"Use it or lose it" policy for subsidized local service carriers.*

(a) *Expansion of local carrier services.* Consistent with the Board's basic policy of affording the advantages of air transportation to as many persons as practicable, the Board has substantially expanded the services of subsidized local carriers and has given many small cities, with marginal or unknown traffic potentialities, a chance to demonstrate that they will use and can support new or improved air services adapted to their specific needs. The Board expects the cities awarded local air service to make a determined effort to generate the traffic forecast in the certification proceedings. Unless adequate use is made of subsidized air services, the cost to the Government is not justified and the Board should terminate the authorization.

(b) *Minimum traffic standard for newly certificated cities.* It is the policy of the Board to make an early and critical evaluation of the traffic results of new authorizations to determine whether newly certificated cities are making sufficient use of authorized services or should lose such services for lack of use. Under this "use it or lose it" policy, the Board will require each city to originate an average of five or more passengers per day during the 12-month period following the initial 6 months of operations. If a city is certificated on more than one segment, the five-passenger standard will be applied to each segment. If a city fails to meet this minimum traffic standard, the Board will, in the absence of unusual or compelling circumstances, institute a formal investigation to determine whether service should be suspended or terminated. A city generating the bare traffic minimum during this trial period cannot safely assume that continued service is assured; the Board expects most cities to exceed the minimum requirements.

* * * * *

(d) *Continued use of local carrier services.* In evaluating the continuing need for air service at any point or on any route segment served by a local service carrier, the Board will use the minimum traffic standard of five passengers as a guide line, regardless of the type or duration of an authorization. The Board will require the local service carriers to make appropriate periodic reports of traffic results. Air carrier management is expected to suggest route or authorization modifications as soon as deficiencies in service become apparent. When a city or route segment fails to make continued use of subsidized services, the carrier is free, and is encouraged, to apply for suspension of service in advance of a Board proceeding to terminate the certification. The failure of a local service carrier to exercise vigilance in

this regard may, in fact, reflect upon the economy and efficiency of management in proceedings to determine subsidy needs under section 406 of the Act.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,160

BRANIFF AIRWAYS, INCORPORATED, PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

EASTERN AIR LINES, INC., INTERVENOR

ON PETITION FOR REVIEW OF ORDERS OF THE CIVIL AERONAUTICS BOARD

Decided April 12, 1967

* * * * *

Before Danaher, McGowan and Leventhal, Circuit Judges.

Leventhal, Circuit Judge:

* * * * *

B. The Procedural Objections to the Board's June 1, 1965, Order Certifying Eastern.

1. Braniff argues that the June 1, 1965, order is invalid because no quorum of the Board was available on critical dates.

The award on its face indicated that it was concurred in and signed on June 1, 1965, by Chairman Boyd (as well as Members Minetti and Gillilland). Braniff argues that by June 1, 1965, Mr. Boyd was

no longer a member of the Civil Aeronautics Board since on that day he was sworn in as Under Secretary of Commerce.

The payroll records of the agencies show that Mr. Boyd was carried on the payroll of the Board only through May 31, 1965, and on the payroll of the Department of Commerce as of June 1, 1965. But these records explicitly declare that they are to be used for payroll purposes only. These bookkeeping computations do not control substantive questions of official authority.

Mr. Boyd did not formally resign. After presiding over the Board's conference on the morning of June 1, he made the short journey to the White House to be sworn in to his new office. We are convinced that he was still a qualified member of the Board when its deliberative process was completed on this case.

2. Braniff then says that although the award was dated and entered on June 1, it was not served until June 2, and that under the Board's own decisions, *e.g., New York-Florida Case,* 24 C.A.B. 94, 229 (1956), a "proposed decision of the Board does not become effective until an opinion and order containing detailed findings of fact and conclusions of law has been approved, issued, *and served* * * *. Until such time, each Member has retained full power to revise or reverse his vote and his findings on any of the matters under consideration." (Emphasis added.) We must read that passage in context. It was an attempt by the Board to justify its practice of issuing press releases announcing a result tentatively arrived at long in advance of the issuance of an opinion and order. In our view it is plain that once all members have voted for an award and caused it to be issued the order is not nullified because of incapacity, intervening before the

ministerial act of service, of a member needed for a quorum. The Board's rulings on the other orders entered June 1 and served at a later date indicate that the Board considers the crucial time for testing the validity of an order to be the time when it is adopted and entered, and not when it comes into the hands of the parties.[2] This approach seems entirely reasonable.

3. Next, Braniff challenges the Board's use of its "notation" procedure. Under the notation practice the views and votes of the members of a regulatory agency may be recorded separately rather than in joint session, and circulated to the remaining members for their attention.

Under Section 201(c) of the Federal Aviation Act of 1958, 49 U.S.C. § 1321(c) (1964), "three of the members shall constitute a quorum of the Board." Valid agency action depends on the effective concurrence of a majority of the designated quorum, *WIBC, Inc.* v. *FCC,* 104 U.S. App. D.C. 126, 128, 259 F. 2d 941, 943, *cert. denied,* 358 U.S. 920 (1958). But the quorum acting on a matter need not be physically present together at any particular time to ponder the evidence, *Sisto* v. *CAB,* 86 U.S. App. D.C. 31, 38, 179 F. 2d 47,

[2] Even those members who thought reconsideration should have been granted, and the route assigned to Braniff, did not do so on this ground. In considering the *Salisbury-Wilmington "Use It or Lose It" Case,* Order E–22253, June 1, 1965, 2 CCH Av. L. Rep. Par. 21562 (1965), the Board rejected the argument that Chairman Boyd was not a member on June 1, held that he continued in office until he took his new oath that afternoon, and dismissed the petition for reconsideration. (Order E–22472, July 23, 1965). That order was affirmed by this court: *New Castle County Airport Comm'n* v. *CAB,* — U.S. App. D.C. —, 371 F. 2d 733 (1966). We avoided passing on this issue, on the basis of representations it was not properly before us but would be ripe for our attention in the instant case.

54 (1949). Section 1001 of the Act authorizes the Board to "conduct [its] proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice." 49 U.S.C. § 1481 (1964). This permits the Board to proceed with its members acting separately, in their various offices, rather than jointly in conference. This is a reasonable way for the Board to proceed in dealing with its not inconsiderable work load. A similar system is in use on this court for processing motions and the deluge of petitions for rehearing *en banc*.

The Interstate Commerce Commission's use of notation voting procedure has been held valid under an identical statutory provision, Section 17(3) of the Interstate Commerce Act, 49 U.S.C. § 17(3) (1964). See *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 784–86 (S.D. Texas, 1960), *aff'd per curiam sub nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961). See also *Eastland Co.* v. *FCC*, 67 App. D.C. 316, 319, 92 F. 2d 467, 470, *cert. denied*, 302 U.S. 735 (1937), construing the equivalent section of the Communications Act, Section 4(j), 47 U.S.C. § 154(j) (1964).

Braniff argues that the notation procedure, while not invalid per se, was improper here because our previous remand to make adequate findings made this case "peculiarly appropriate for discussion among Board members" and "there was evidently no meeting to discuss the findings." (Brief for Petitioner at 26). It is "not the function of the court to probe the mental processes" of administrative officers, *Morgan* v. *United States*, 304 U.S. 1, 18 (1938). A strong presumption of regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues and adverted to the

views of their colleagues. See generally *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 696 (9th Cir.), *cert. denied,* 338 U.S. 860 (1949); *T.S.C. Motor Freight Lines, Inc.* v. *United States, supra,* 186 F. Supp. at 790. Agencies are no more bound to enter for the record the time, place, and content of their deliberations than are courts.

4. It appears that Chairman Boyd actually signed the award on May 28, 1965, not June 1. So stated Members Minetti and Gillilland on denial of reconsideration. After the petition for review was filed, Braniff learned that Chairman Boyd had not been in Washington on May 28. Braniff sought clarification and the Board filed in this court an affidavit of its Associate General Counsel that stated in pertinent part:

> I looked into the questions that were raised by the [Braniff] letter. I learned that Chairman Boyd was in Florida on May 28, attending a testimonial dinner, that a copy of the final draft of the Board's opinion and order which became Order No. E–22252 was taken to him, that Chairman Boyd subsequently directed his Assistant to affix Chairman Boyd's signature to the signature copy of Order No. E–22252 in accordance with normal practice, and that Chairman Boyd's Assistant carried out that instruction. Finally, I was told that if the circumstances required it, Mr. Boyd and his Assistant would supply affidavits covering these circumstances.

There were reasonable circumstances justifying presentation of this issue to the court, although it had not been urged before the Board,[3] but we find no prejudicial error requiring reversal on this ground.

[3] See Section 1006(e) of the Federal Aviation Act of 1958, 49 U.S.C. § 1486(e) (1964). The Administrative Procedure Act provides that in reviewing agency action "due account shall be

We agree with Professor Davis, 2 ADMINISTRATIVE LAW § 11.07 at 66 (1958), that "despite its immediately appealing quality, the broad ideal that agency heads should do personally what they purport to do is for many functions impractical and unworkable * * *." The use of assistants in the administrative process is indispensable to the orderly and efficient expedition of great volumes of work and the reconciliation of divergent responsibilities. The courts have consistently approved an administrator's utilization of a staff member he deemed qualified in the performance of his official functions. It is well settled that even in the adjudicatory process, an administrative officer may rely on subordinates to sift and analyze the record and prepare summaries and confidential recommendations, and the officer may base his decision on these reports without reading the full transcript. See, *e.g., Morgan* v. *United States,* 298 U.S. 468, 481–82 (1936); *Norris & Hirshberg, Inc.* v. *SEC,* 82 U.S. App. D.C. 32, 36, 163 F. 2d 689, 693 (1947), *cert. denied,* 333 U.S. 867 (1948); *Willapoint Oysters, Inc.* v. *Ewing, supra,* 174 F. 2d at 696. The only requirement is that the decision in the ultimate must be that of the administrative officer, for he "bears full legal and personal accountability for that which bears his name or concurrence." *T.S.C. Motor Freight Lines, Inc.* v. *United States, supra,* 186 F. Supp. at 790.

While such procedure should be used sparingly, and only when prompted by some administrative necessity, we think a member of a regulatory agency who has considered the issues in a matter may direct an assist-

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taken of the rule of prejudicial error." 5 U.S.C. § 706. (This is the numbering in the recodification wrought by Pub. L. 89–554, 80 Stat. 378 (1966).)

ant to record his concurrence in a proposed disposition of them.[4]

The minutes of the June 1 meeting recite that Chairman Boyd presided.[5] Although this case was not formally raised at the meeting, we think this circumstance, coupled with the unquestioned fact that the other four members of the Board (two as not participating) on that day signed the opinion which on its face contained the concurrence of Chairman Boyd, supports the inference that the authorized signature of the Chairman was affixed to the opinion while he was still competent to vote.[6]

We do not intend that the attention we have paid to these arguments be interpreted as giving disappointed litigants a license to rummage through the internal processes of an administrative agency, searching for some irregularity, or the hint of one, on which

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[4] The Second Circuit has accepted an even greater delegation of responsibility by Board members to their subordinates. In *Eastern Air Lines, Inc.* v. *CAB*, 271 F. 2d 752, 758 (1959), *cert. denied*, 362 U.S. 970 (1960), that court found no error where the assistants to two Board members participated in meetings in place of their superiors and actually cast votes on tentative awards. The court there pointed out that the votes "cast by the assistants were cast in compliance with instructions given by their superiors."

[5] This minute implicitly affirms Chairman Boyd's belief that he was still authorized to function as a member of the Board. This court has previously relied on the minutes of Board meetings to show that a member regarded himself as "qualified and prepared to vote on the issues in the case," *Western Air Lines, Inc.* v. *CAB*, 122 U.S. App. D.C. 81, 83 n.4, 351 F. 2d 778, 780 n.4 (1965), and to demonstrate that only authorized personnel attended, *North Central Air Lines, Inc.* v. *CAB*, 108 U.S. App. D.C. 185, 190, 281 F. 2d 18, 23 (1960).

[6] We need not consider whether there would be any material difference if the direction given while Mr. Boyd was a member had been executed after he severed his connection with the Board.

to base a challenge to the validity of the decision. In a few highly unusual cases it may be appropriate to examine the procedures followed in making an institutional decision, see *Union Savings Bank* v. *Saxon,* 209 F. Supp. 319 (D.D.C. 1962). The general rule remains that a party is not entitled to probe the deliberations of administrative officials, oversee their relationships with their assistants, or screen the internal documents and communications they utilize. "Just as a judge cannot be subjected to such a scrutiny * * * so the integrity of the administrative process must be equally respected." *United States* v. *Morgan,* 313 U.S. 409, 422 (1941). We cannot allow the recital by an administrative agency that it has considered the evidence and rendered a decision according to its responsibilities to be overcome by speculative allegations. See *Willapoint Oysters, Inc.* v. *Ewing, supra,* 174 F. 2d at 696.

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